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| Case Number: | Civil Appeal 63 of 1986 |
| Date Delivered: | 24 Jul 1987 |
| Case Class: | Civil |
| Court: | Court of Appeal at Mombasa |
| Case Action: | Judgment |
| Judge: | John Mwangi Gachuhi, James Onyiego Nyarangi, Harold Grant Platt |
| Citation: | Nakuru Automobile House Ltd v Ziaudin [1987] eKLR |
| Advocates: | Mr A B Shah for the Appellant, Mr Suchak for the Respondent |
| Case Summary: | **Nakuru Automobile House Ltd *v* Ziaudin**<br><br>Court of Appeal at Mombasa July 24, 1987<br><br>Nyarangi, Platt & Gachuhi JJA<br><br>Civil Appeal No 63 of 1986<br><br>(Appeal from a judgment of the High Court at Mombasa, Kneller J)<br><br>***Vicarious liability*** *– master and servant – when vehicle owner may be held liable for the negligence of its driver – company vehicle lent to four persons by managing director – company not involved in decision to lend vehicle – vehicle used to assist a director of the company participating in racing competition – vehicle involved in accident – whether company liable.*<br><br>A car belonging to the appellants was involved in a collision with the respondent's lorry. Three occupants of the appellant's car died. The respondent sued the appellants in the High Court for damages and compensation for the loss of his |

lorry which was written-off as a result of the collision.

Evidence was given that the appellant company owned the car which was used by its directors for business trips. The managing director lent it to four persons who would use it to enjoy the 1975 *Safari Rally.* The appellant company did not participate in the rally but the car could be used to assist one of its directors who was taking part in it.

The High Court found in favour of the respondent/plaintiff and awarded him damages.

The appellant appealed against the decision arguing, among other things, that the judge erred in holding that its car was being driven in the course of its employment.

The respondent's advocate argued that as the appellant was a dealer in motor spares and stood to gain from its director's participation in the rally, it should be held liable.

**Held:**

1. In order to fix liability on the owner of a car for the negligence of its driver, it is necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent.

2. To establish the agency relationship, it is necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions and was doing so in performance of a task or duty delegated to him by the owner.

3. The appellant company did not participate in the decision to lend its vehicle to the four persons as it was kept out of the decision by the managing director who lent the vehicle. The company had nothing to benefit from the use of the vehicle by the four.

4. The managing director did not on behalf of the appellant company delegate a task or duty to be performed by the four persons to whom he lent the vehicle.

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| | 5. The appellant company's vehicle was not being used wholly or partly for the appellant company's business or purpose and the company could not be liable for any negligence on the part of the driver.<br><br>*Appeal allowed.*<br><br>**Cases**<br><br>1. *Selle and another v Associated Motor Boat Company Ltd and others* [1968] EA 123<br><br>2. *Omrod and another v Crosville Motor Services and another* [1953] 2 All ER 753<br><br>3. *Morgans v Launchbury* [1972] 2 All ER 606<br><br>4. *Anyanzwa v Gasperis* [1981] KLR 10<br><br>**Statutes**<br><br>No statutes referred.<br><br>**Advocates**<br><br>*Mr A B Shah* for the Appellant.<br><br>*Mr Suchak* for the Respondent. |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Mombasa |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Appeal allowed |
| History County: | - |
| Representation By Advocates: | Both Parties Represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: NYARANGI, PLATT & GACHUHI JJA)**

**CIVIL APPEAL NO. 63 OF 1986**

**NAKURU AUTOMOBILE HOUSE LTD…..……..APPELLANT**

***VERSUS***

**ZIAUDIN……..RESPONDENT**

**JUDGMENT**

This is an appeal from a judgment of Kneller, J (as he then was) given on February 1, 1985 whereby he awarded damages in the agreed sum of Kshs 30,000 plus interest and costs to the plaintiff for loss of the Bedford lorry KJJ 676. The action in the High Court arose out of a collision on Good Friday March 28, 1975 between a diesel 7 ton belonging to Nakuru Automobile House Ltd, the appellants. The two vehicles collided on the Mombasa Nairobi road, some 35 miles from Voi towards Mombasa. The driver of the Datsun saloon and his two Goan passengers were all killed. David Joshi, a step-son of Dass Joshi, the managing director of the appellant, survived. The plaintiff, registered owner of the Bedford lorry sued the appellants who were the registered owners of the Datsun saloon for damages as compensation for the loss of the Bedford lorry which was written-off as a result of the collision.

The grounds of appeal, as drafted, state (1) the judge was wrong in law in his evaluation of the evidence of the driver of the Bedford truck, of Jesse Sherwin and Rehman Mohamed as to the condition of the truck; (2) the judge failed to take into consideration the evidence that one of the batteries in the Bedford vehicle was flat and so affected the lights; (3) the judge erred in in holding that the appellant's vehicle was being driven in the course of its employment; (4) it was wrong in law for the judge to believe the evidence of (a) the Bedford truck driver and (b) of Jesse Sherwin; (5) The judge failed to evaluate or consider the evidence of all witnesses. Mr Shah for the appellant company argued grounds 1,2,4 and 5 together and counsel made it a matter of complaint against the plaintiff that there was no self-starter in the Bedford vehicle, that the judge did not state the parts of the evidence of Jesse Sherwin and Zaharan which he believed but that on the evidence as a whole there was adequate material for the judge to conclude that the Bedford vehicle was probably without lights. On ground three Mr Shah contended that there was nothing to show that the Datsun saloon was a rally helper,that the saloon car was used for the benefit of Ashok and Kim Gatendo, the four persons asked for the saloon to enjoy the rally and cheer Ashock, and that the appellant had not delegated any duty to the driver of the Datsun saloon. In his reply Mr Suchak for the respondent closely analysed the evidence and urged that as the appellant company which deals in motor spares stood to gain from the publicity and success of one of its directors participating in the rally, it is right that it should be fixed with liability. The respondent's counsel invited the court to infer that the appellant company had something to hold back by not calling David Joshi who survived.

I go straight to the kernel of this case namely, whether the driver of the Datsun Saloon was delegated a task to drive it on behalf of and on the business of Nakuru Automobile House Limited.

The relevant evidence was that the appellant company, a family concern of four, owned the Datsun saloon for use by directors for business trips. Just before the 1975 Safari Rally, the managing director of the appellant company lent the Datsun saloon KLT 937 to four persons – not to any of them in particular who wished to enjoy the rally. The four were Willy Louis, Fernandes, DaCosta and Joshi, a step son of MD. The appellant company did not participate in the rally but the Datsun saloon could be used to assist Ashok and Kim Gatende who were taking part in the rally. Ashok Joshi was one of the four directors of the appellant company.

I pause here to observe that the managing director and Ashock Joshi, a director of the company, had the opportunity to involve their company in the rally, had the company so wished. The appellant could have lent the company's Datsun saloon to Ashok Joshi, its director and requested him to participate in the rally for the company. That is not, however, what happened. The appellant company was kept out of the decision by the Managing director to lend the Datsun saloon to the four.

Approached in that way, it seems to me that the two directors of the appellant company considered that whether or not the four to whom the Datsun saloon had been lent enjoyed themselves the rally was of no concern to the appellant company and consequently that the company had nothing to benefit from the use of the Datsun saloon by the four. To put the matter according to its essentials, the managing director did not give Ashok Joshi the task of selling or introducing the company's motor spares and accessories to other Safari Rally drivers or to the agents of the other companies taking part in the rally. Was left uninformed about what facts could justify the argument by Mr Suchak that the appellant company would benefit from the safari rally.

The Datsun salon was not being used wholly or partly for the appellant company's business or purpose; the appellant company could not be liable for any negligence on the part of the driver: *Ormrod v Crossvile Motor Services* [1953] 2 All ER 753 at p 755 and *Selle & another v Associated Motor Boat Co Ltd* [1968] EA 123. Lord Wilberforce put it thus in *Morgans v Launchbury & others* [1972], 2 All ER 606 at p 609,

"For I regard it as clear that in order to fix vicarious liability on the owner of a car … it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty … but it has never been held that mere permission is enough to establish vicarious liability …"

In that case it was held by the House of Lords that in order to fix liability on the owner of a car for the negligence of its driver, it is necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent. To establish the agency rlationship, it is necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions and was doing so in performance of a task or duty delegated to him by the owner. This court approved and applied these principles in *Anyanzwa & Others v Luigi De Gasperie & Another*, Civil Appeal No 31 of 1981 (unreported). The reason behind the principle lies behind vicarious liability in general. And that is to place liability on the party who should in justice bear it. The learned judge found for the defendant for the reason as I understand his judgment, that the appellant company through the managing director lent the Datsun saloon to the four mechanics to support and help Ashok Joshi and Kim Gatende. That finding omits the fact, established on the evidence, that the managing director did not on behalf of the company delegate a task or duty to be performed by Ashok or any of the other three on behalf of the appellant company. That is a factor which has weighed heavily with me and it is the ground on which I rest my judgment that the appellant company is not vicariously liable for the tort of the driver of the Datsun saloon.

It is therefore with special great respect that I find myself at variance with Kneller, J. In my view this

appeal can be determined on a decision on the issue of vicarious liability. Once that issue is dealt with, there is no need for any decision on the cross-appeal on the dispute as to whether or not the Bedford lorry was being driven negligently without lights.

I would allow the appeal and set aside the judgment of the High Court. I would award costs of this appeal and of the High Court to the appellants. As Platt and Gachuhi, JJA agree it is so order.

**Platt JA**. I agree.

As we are differing from our erstwhile colleague I shall say a few words.

After a very clear exposition of the principles involved, based upon East African and English Authorities to which Nyarangi, JA has referred, the learned judge set out his findings in tabulated form, which obscured his reasoning and provided no reference to the evidence upon which the findings were made. It is therefore not explained why the finding (iii) Willy Louis was held to be driving the plaintiff company's Datsun at the owner's request, express or implied, or on its instructions. It had simply been borrowed at the expense of the borrowers. Next it is not clear how in finding (iv) the owner had delegated a task or duty to Jean Willy Louis, or that the company was under a duty to transport these supporters. It is very difficult to appreciate why the *owner* should be under a duty to transport these unfortunate supporters to an event, in which the family of Ashok did not want him to be involved. Ashok entered the rally entirely for his own purpose as the judge later found. Then in finding (v) the plaintiff company was found to have had an interest or concern in the purpose for which the Datsun was driven. The interest is not explained. This finding seems to go with finding (vii) that the Datsun was being driven at the material time for the benefit of the plaintiff. The learned judge himself held that the plaintiff would not directly benefit from Ashok Joshi's participation or victory in the rally. Mr Suchak, who appeared to have some experience of rally organization, said that the plaintiff would get enormous publicity. There is no evidence to that effect. Finally, there was "some control" of the Datsun, but what control is not clear.

The crucial confusion resides in these conflicting passages which occur in one paragraph at the end of the judgment.

"He (ie Ashok) was taking part in the Safari Rally on his own account and not that of the Nakuru Automobile House. Nakuru Automobile House would not directly benefit by Ashok's participation and or victory…"

"But Nakuru Automobile House through its managing director, Ram Das Joshi, lent the Datsun to these four mechanics to support and help "Kitinge" and Ashok, so in my judgment, it is vicariously liable for the negligence of Willy Jean Louis."

On this basis the reasoning of Lord Wilberforce in *Morgans v Launchbury*, [1972] 2 All ER 606 at p 609 set out by Nyarangi, JA has been used to show that the plaintiff company had an interest in Ashok's welfare, and hence that it was not a case of mere permission. But it is manifest that it was merely a case of permission there being no other evidence at all that the plaintiff company had any interest in this matter. There was possibly a private family interest and not a company interest. It seems that the distinction became blurred because of a critical attitude to the evidence of Ram Das Joshi, which appears from the record to have been unfortunate. For these reasons I agree with the conclusions reached by Nyarangi, JA and the orders proposed by him.

**Gachuhi JA**. I have read the judgment of Nyarangi, JA which I am in agreement with that the appeal should be allowed. This appeal is mainly on vicarious liability and negligence. Counsel for the parties

submitted extensively on these two grounds. The emphasis is that, if the appellant would succeed on the ground of vicarious liability, there will be no need to deal with the ground on negligence. For that reason, I will first deal with the first ground.

The basic principle of vicarious liability is that, the person who is guilty of an offence for which his employer or the principal would be liable must be in the relationship to act on authority, direct or implied instructions, and what is done must be for the benefit or have direct interest of the employer or the principal. Mere authority to do an act which may cause liability for wrong-doing or omission to do it will not bind the employer or principal. It must be shown that the person to be charged for that liability is an employee or an agent and not a licencee.

Perhaps it is more fitting to quote the decision of the House of Lords in *Morgan v Launchbury and others*, [1972] 2 All ER 606 holding No 1.

“In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner’s servant or that, at the material time, the driver was acting on the owner’s behalf as his agent. To establish the existence of the agency relationship it was necessary to show that the driver was using the car at the owner’s request, express or implied, or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner. The fact that the driver was using the car with the owner’s permission and that the purpose for which the car was being used was one in which the owner had an interest or concern, was not sufficient to establish vicarious liability. Nor was there any special test of liability in relation to a family car which was owned by one spouse and driven by the other.”

In the present case, there is no evidence that all four professional mechanics (three who died and the survivor) were driving the car Datsun KLT 937 as servants or agents of the appellant or that the journey they were making was for the interest or the benefit of the appellant. The fact that a director and a son of the managing director of the appellant was in the rally, does not make the appellant liable for the accident which they were involved in. What is on the evidence is that the deceased and the survivor asked for the use of the car to enjoy the rally. In the course of enjoying the rally, if they found their friends Ashok Joshi and Kim Gatende, in difficulty, they

would assist them. This is of course on their own. Nothing is shown that the appellant will benefit from the rally even if Ashok and Kim Gatende were to win the rally. There is no vicarious liability between the users of the car and the appellant. The appeal should succeed on this ground. There would be no useful purpose to be served by dealing with the negligence ground of appeal to which there was also a cross-appeal.

Likewise, I would allow this appeal, set aside the judgment of the High Court on the terms proposed by Nyarangi JA.

Dated and Delivered at Mombasa this 24th day of July, 1987

**J.O. NYARANGI**

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**JUDGE OF APPEAL**

**H.G PLATT**

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**JUDGE OF APPEAL**

**J.M GACHUHI**

**……**

**JUDGE OF APPEAL**